

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DENNIS EAST INTERNATIONAL, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 04-11994-RWZ
)	
ATHOME AMERICA, INC.,)	
)	
Defendant.)	

ANSWER IN PART AND AFFIRMATIVE DEFENSES TO COMPLAINT

NOW COMES Defendant AtHome America, Inc. in Answer in part to the Complaint of Plaintiff Dennis East International, Inc.

1. AtHome America, Inc. admits the Complaint makes certain allegations under the Copyright Laws of the United States of America, 17 U.S.C. §101 *et seq.*, federal unfair competition under the Lanham Act, 15 U.S.C. §1125(a) and unfair and deceptive acts under Chapter 93A of the Massachusetts General Law, but denies liability under said allegations.

2. Although not alleged by Plaintiff, AtHome America, Inc. admits that this Court has subject matter jurisdiction with regard to the allegations arising under federal copyright law, 17 U.S.C. §101 *et seq.*, and federal unfair competition law, 15 U.S.C. §1125(a), pursuant to 28 U.S.C. §§1331 and 1338. AtHome America, Inc. also admits jurisdiction under 28 U.S.C. §1332. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of subject matter jurisdiction relating to the claims arising under the unfair and deceptive acts under Chapter 93A of the Massachusetts General Law and therefore denies the same.

3. Admitted.

4. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of subject matter with regard to unfair and deceptive acts under Chapter 93A of the Massachusetts General Law and therefore denies the same.

PARTIES

5. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 and therefore denies the same.

6. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 and therefore denies the same.

7. AtHome America, Inc. denies that it is a corporation organized under the laws of the State of Illinois, but admits that it is a corporation organized under the laws of the State of Delaware with an address of 5625 West 115th Street, Alsip, IL 60803 and that it distributes a catalog to the public. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7 and therefore denies the same.

BACKGROUND

8. AtHome America, Inc. repeats and realleges its answers to Paragraphs 1 to 7.

9. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 and therefore denies the same.

10. AtHome America, Inc. admits that Exhibit B contain, *inter alia*, copies of four purported copyright registrations. AtHome America, Inc. is without knowledge or

information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10 and therefore denies the same.

11. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 and therefore denies the same.

12. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12 and therefore denies the same.

13. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 13 and therefore denies the same.

14. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 and therefore denies the same.

15. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 and therefore denies the same.

16. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 16 and therefore denies the same.

17. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 and therefore denies the same.

18. AtHome America, Inc. is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 18 and therefore denies the same.

COUNT I

19. AtHome America, Inc. repeats and realleges its answers to Paragraphs 1 to 18.

20. AtHome America, Inc. admits that Count I alleges federal copyright infringement of Plaintiff's copyrights listed in Paragraph 10, but denies that said claims are valid.

21. The averments of Paragraph 21 are conclusions of law to which no response is required. To the extent a response is deemed required, the averments of this Paragraph are denied.

22. Denied.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Plaintiff is not entitled to recovery as this action was not commenced within the time required by the law and provided therefor.

SECOND AFFIRMATIVE DEFENSE

The Plaintiff's suit is subject to dismissal because the Plaintiff has failed to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's suit is subject to dismissal because of insufficiency of process and insufficiency of service of process pursuant to Fed. R. Civ. P. 12(b)(4) and 12(b)(5).

FOURTH AFFIRMATIVE DEFENSE

The Plaintiff, by and through its own actions and conduct, is estopped from asserting any claims against these Defendant.

FIFTH AFFIRMATIVE DEFENSE

Counts II and III are preempted by 17 U.S.C. §301.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's copyright registrations are invalid.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claimed works lack sufficient originality to be protected by copyright law.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's copyright infringement claims fail because the allegedly infringing works are not substantially similar to the alleged copyrighted works.

NINTH AFFIRMATIVE DEFENSE

The allegedly infringing works were independently created.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's copyright infringement claims are barred by the first sale doctrine.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff does not properly own the allegedly copyrighted works or otherwise have a copyrightable interest in the allegedly copyrighted works as one or more third parties were responsible for creation of the allegedly copyrighted works.

TWELFTH AFFIRMATIVE DEFENSE

AtHome America, Inc. did not copy Plaintiff's allegedly copyrighted works. In the event that the Court finds that a third party manufacturer, supplier, or distributor copied Plaintiff's allegedly copyrighted works without AtHome America, Inc.'s knowledge or control, AtHome America, Inc. is an innocent infringer under 17 U.S.C.

§504(c)(2). In such case, pursuant to 17 U.S.C. §504(c)(2), the Court is requested to reduce any award of damages.

THIRTEENTH AFFIRMATIVE DEFENSE

The merger doctrine applies to the allegedly copyrighted works and thereby invalidates any copyright or substantial limits any copyright in said works.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims fail, in whole or in part, since the features of Plaintiff's products are exclusively or primarily functional and therefore are not protectable.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff is not entitled to statutory damages or attorney's fees under 17 U.S.C. §412 (2) since Plaintiff did not register its claims of copyright(s) prior to AtHome America, Inc.'s alleged infringements or within three month after first publication.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff has suffered no damages, *de minimis* damages and/or has failed to mitigate its damages, if any.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiff has suffered no harm or irreparable harm.

EIGHTEENTH AFFIRMATIVE DEFENSE

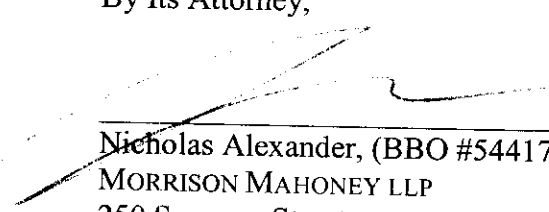
The relief sought by Plaintiff is barred by unclean hands.

WHEREFORE, AtHome America, Inc. requests judgment in its favor against Plaintiff dismissing all claims against it and with an award of attorneys' fees and costs of this suit.

Dated: December 23, 2004

Respectfully submitted,

The Defendant,
ATHOME AMERICA, INC.,
By Its Attorney,



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